SI RUSA INN SDN. BHD. & ORS.

v.

THE COLLECTOR OF LAND REVENUE, PORT DICKSON & ORS.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 17 OF 1983]
31 DECEMBER 1985

LAND LAW: *Private right of way - Principles on which it is granted - Definition of "country" in s. 389, 11(d) of National Land Code - Section 418(2) - Functus officio - Section 34 - Null and void - Mala fides - Onus - Balance of probabilities - Section 390(3) definition of "expedient" - Meaning of "reasonable" - General Torrens principles.*

In 1982, the 2nd respondent (the Grantee) applied for a private right of way over the piece of land, being Lot No. 293 (the said land). This application was heard on 2 March 1982, in the absence of interested parties, namely, the 1st appellant who is the registered owner of the said land, the 2nd appellant who is the registered lessee and the 3rd appellant who is the registered chargee. The Collector granted this order.

The Collector was later directed to reopen the inquiry and to hear the application *de novo* since the order was made in the absence of the interested parties. On 11 December 1982, it was heard for the second time in the presence of all Counsel for the appellants. The Collector then made the order complained of, stating that he had inspected the said land and the police land and had found the wall built by the police. He further held that for security reasons, it was logical and appropriate that the private right of way be granted. The appellants then appealed.

This case involved the consideration of principles upon which a private right of way be granted against a landowner under the National Land Code ("the Code").

Held:

[1] Section 389(3) of the Code provides that a private right of way could only be created over alienated "country" land. The procedure by which any area of state land can be declared "town" or "village" is set out in s. 11(d) of the Code. Since this procedure was not complied with in respect to the said land, the said land is country land.

[2] The appellants contended that the said Collector after having made an order on 2 March 1982 was therefore acting *functus officio* in relation to the later order. However the Legal Adviser said that this point was not raised at the second enquiry. Taking into account s. 418(2) of the Code, it was held that a new point cannot be allowed to be raised for the first time before an Appellant Court or tribunal. The appellants could not therefore raise the issue of *functus officio* at this stage when they had not done so earlier.

[3] Under s. 34 of the Code, the first order made had become null and void on its being impliedly set aside upon the making of the second order after the valid second hearing *de novo*.

[4] The appellants also contended that there was either *mala fides* on the part of the said Collector or that the said Collector was biased or improperly influenced at the hearing. The appellants have however failed to discharge their onus of establishing bias or *mala fides.* The appellants have not, on a balance of probabilities, satisfied the Court of this contention.

[5] Section 389 of the Code deals with the practice and procedure in respect of the granting of public or private right of way but this section does not contain the principles upon which the same is granted. However, the word "expedient" in s. 390(3) of the Code was held to mean that if a Collector is satisfied that it is expedient, he should then act or exercise his discretion properly and reasonably in all cases, save in exceptional circumstances where such departure from such propriety or reasonableness can be made.

[6] On the question of whether it was reasonable in the circumstances to grant the private right of way, it was held that "reasonably" does not mean "conveniently" (*Liew Peck Lian & Ors. v. The Conservator of Forests* [1961] MLJ 117). There must be something more than just mere inconvenience or convenience; there must be some situation that partakes of gravity or urgent necessity. There were no exceptional circumstances here and neither was this a situation of urgent necessity. The said Collector had therefore erred in making the order complained of.

[Appeal allowed.]

Obiter: The juxtaposition of Torrens system of land law represented by the Code, with the principle of inviolateness of land, does nothing to detract the latter from its value. The common law and equity in relation to land have remained largely unimpaired by the Code which is, substantially, a system of registration of conveyances of land and not to oust such common law and equity.

Cases referred to:
Eu Finance Berhad v. Lim Yoke Foo [1982] 2 MLJ 37
Liew Peck Lian & Ors. v. The Conservator of Forests [1961] MLJ 117
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 135

Legislation referred to:
National Land Code 1965, ss. 34, 51, 124, 387, 389, (3), 390(3), (4), 418(2), 434

Other sources referred to:
Concise Oxford Dictionary, 5th Edn.

For the 1st appellant - R. Shanmuganathan; M/s. Krish, Shan & Lee
For the 2nd appellant - Tee Kim Chan; M/s. Shearn Delamore & Co.
For the 3rd appellant - Lee Boon Peng; M/s. Lee Boon Peng & Co.
For the 1st and 3rd respondents - Abu Samah bin Nordin, State Legal Adviser, Negeri Sembilan
For the 2nd Respondent - J. Nadchatiram; M/s. J. Nadchatiram

JUDGMENT:

Peh Swee Chin J:

This is an unusual case involving as it does, the consideration of principles upon which a private right of way may be granted against a landowner under the National Land Code.

It is an appeal against an order of the Collector of Land Revenue, Port Dickson, granting to the 2nd respondent (hereinafter called the Grantee), a private right of way over the piece of land, being Lot No. 293 (and more fully described in this originating motion), against the 1st appellant, its registered owner; 2nd appellant, its registered lessee; and 3rd appellant its registered chargee.

The Grantee's own land, being a kind of a second-layer land from the sea shore or foreshore, has no frontage to the sea shore and is sandwiched between the said Lot 293 on one side, and another piece of land belonging apparently to the Royal Malaysia Police Force, (hereinafter called the police land). The private right of way was granted over Lot 293 in which all the appellants are interested in the ways mentioned above.

It is common ground, that on 2 March 1982, the application for the private right of way was heard in the absence of those interested parties, save the Grantee and his Counsel, and the Collector, named Encik Hamzah bin Ali (hereinafter called the said Collector), without much ado, granted an order for such private right of way.

From the Land Office file in question, it appears that the said Collector's superior officer has directed the said Collector to reopen the enquiry and hear the said application *de novo*, apparently on account of the order being made in the absence of the interested parties. The application, after an adjournment on 8 November 1982, was fixed for 11 December 1982 when it was heard for the second time, in the presence at least of all Counsel for the appellants who were heard. There was some dispute at the hearing earlier as to when the decision of the said Collector was actually delivered, or even made, but nothing really very much turns on this as it is common ground that an order was in fact made granting the private right of way complained of.

The arguments of learned Counsel for the appellants before the said Collector were surprisingly brief as apparent from the record of such proceedings. They made similar submissions there to the effect that the Grantee should have applied for a private right of way over the police land before the police built their concrete wall or partitioning wall on both sides of the police land as the Grantee was then having an access to the sea through the police land. Any private right of way granted over Lot 293 would interfere with the peace and quiet of the Lot 293, and that there was doubt if the police land had been gazetted as a security area. Learned Counsel for the Grantee argued before the said Collector that she had protested at the construction of their wall by the police but she could not stop them. Every citizen had a right to the sea shore and that her client could not use Lot 293 then, because it was already fenced up.

The said Collector then made the order complained of, stating that he had inspected Lot 293 and the police land and had found the wall built by the police, possibly from the point of view of security (reasons) and that it was more logical (lojik) and appropriate (wajar) that the private right of way be granted, hence this appeal.

It appears that before me, all the learned Counsel for the appellants had some sort of division of labour among themselves in making their submissions so that each would argue on two or three different points, and I regard this as commendable practice as it has saved time in avoiding a great deal of repetitions. Such being the case, I would refer to arguments of Counsel without specifying as from whom any particular argument has emanated.

The 1st contention raised for the appellants was that Lot 293, being town land, no private right of way could have been created over it by the said Collector, as this would be contrary to s. 389(3) of the National Land Code (hereinafter called the Code). In its unamended form, as it stood at all relevant times in regard to the application for the private right of way, the said sub-section (3) indeed, spoke of alienated "country" land only over which such private right of way could be created. This effect of the said sub-section (3) was readily agreed on all hands but for the appellants, it was of course, argued that Lot 293 was town land while for the respondents if was argued that it was country land.

It would not be necessary to refer in detail to the very careful arguments of Counsel as to whether it was country land or not, but I accept the evidence of PW1, Mohd Lazim bin Ismail, Deputy Commissioner of Lands and Mines as well as Deputy Registrar of Titles, Negeri Sembilan. Land above the shore-line is divided by s. 51 of the Code into (1) town land, (2) village land and (3) country land. Section 11 (d) of the Code provides that the State Authority may, by notification in the *Gazette*, after the survey or definition thereof by or on behalf of the Chief Surveyor, declare any area of the State to be a town or village. Country land requires, from the necessary implication arising out of the absence of any similar provision, no such gazette notification, which is the sole means by which, in my view, any land is classified into a village land and town land respectively, apart from any pre-existing village land or town land before the enforcement of the Code. PW1 produced only two gazette notifications ever published in respect of the Port Dickson District (in which the said Lot 293 is indubitably situated), and the accompanying survey plans, one of which declared certain areas to be village land and the other, the town land. He confirmed he could find no other gazette notification and it appears that searches of learned Counsel for 3rd appellant have not unearthed any other gazette notification either. The said plans do not show Lot 293 as being found within such declared village and town land. I therefore hold that Lot 293 is country land and this finding disposes thus of the first contention.

The second contention raised for the appellants was that the said Collector, having made an order in the first enquiry on 2 March 1982 was *functus officio* and had no power to hold a second enquiry to make the same order for the second time. To this, the learned Legal Adviser, Negeri Sembilan for 1st and 3rd respondents submitted that this point was not raised before the said Collector at the second enquiry or at the hearing *de novo.* It will be observed that this objection about a point not being raised before the said Collector, was the only one raised. The nature of this objection, in my view, is substantially in the realm of practice and precedents. Section 418(2) of the Code expressly provides that any appeal against a Collector shall be made in accordance with the provisions of any written law relating to civil procedure. I am of the view that such an appeal, to be consonant with s. 418(2), common sense and justice shall be subject to the very basic rule (though not a written law), that a new point cannot be allowed to be raised for the first time before an Appellate Court or tribunal. Since the objection was raised, I would have to uphold the objection that appellants could not raise the point of the said Collector being *functus officio.*

Learned Counsel for the respondents however argued that the order made at the original hearing on the first enquiry was null and void because of the absence of the interested parties. Section 34 of the Code provides for any enquiry to be re-opened whereby any order previously made may be varied or set aside in circumstances including the absence of any necessary party at the previous enquiry. I agree that the case of *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 is distinguishable from the present case. I therefore hold that the first order made at the original hearing or the first enquiry on March 2, 1982 had become null and void on its being impliedly set aside upon the making of the second order after the valid hearing *de novo* or the second hearing on December 11, 1982.

The third contention raised for the appellants was that there was either *mala fides* on the part of the said Collector or that the said Collector was biased or improperly influenced at the hearing. This arose in this way. In a plan purportedly filed with the application for the private right of way, a portion (of about 9,000 sq. ft.) of Grantee's land was shown in the said plan to have been delineated and endorsed with the words:- "To be purchased by DYMM Tuanku Ja'afar", the Yang di-Pertuan Besar of Negeri Sembilan.

There can be no doubt that such a plan with such words quoted above existed and this was referred to, for the appellants, in the affidavit filed. This Court would normally now have to begin to consider their effect and impact in this case. However the last of the affidavits filed by anybody in this motion was filed by the said Collector himself (i.e. Hamzah bin Ali). He deposed in effect that the original or a similar plan as attached to the Grantee's application and another copy of the similar plan as submitted and signed by the 1st appellant, did not contain the quoted words and that these copies of the plan were the ones referred to at the hearing on 11 December 1982 before him and on which he based his decision. The original Land Office file was referred to and marked as Exhibit HA-1. I have had a look at the old file and indeed the original plan annexed to the original application of the Grantee did not contain the quoted words. He further deposed that in his order (the subject matter of this appeal) he had referred to the plan described as No. (24) dlm. PTPD 145/102/08/03. This plan was enclosure (24) of the said Land Office file submitted by the 1st appellant and looking at it, it does not contain the words complained of or any erasure mark. He further deposed to the fact that he had no knowledge of the plan with the quoted words.

The plan with the quoted words appears to have come to light when such a plan with such quoted words was sent together with a letter dated April 18, 1983 from one Baba bin Hassan, a colleague of the said Collector, conveying the decision or order of the said Collector to the Grantee, the order appealed from. The said Collector said that the said Baba bin Hassan normally conveyed his decision. A copy of this letter was also sent to the Private Secretary to DYMM Tuanku Yang di-Pertuan Besar, Negeri Sembilan. Apparently, on discovering the mistake, the said Baba bin Hassan sent another letter dated 6 June 1983 stating that the previous plan (with the words quoted above) was a mistake and enclosed another copy of the same plan with the quoted words erased therefrom, the erasure mark being clearly visible. It is pertinent to note that there is no such erasure mark or any tell-tale mark on the two copies of the plan or original plan the said Collector referred to earlier. The said Collector from the record of proceedings, appears to have made the decision or order complained of on 7 January 1983 and it appears to have been made between the time when the second enquiry ended and 7 January 1983, the delay caused being due to the fact that he went to inspect the Lot 293 and the other adjoining land in question.

The questions that arise are these. The affidavit of the said Collector containing for the first time these exculpatory allegations has not been even formally contradicted. None of the appellants has filed any further affidavit for this purpose. The contents of the affidavit touching on such central issues are not to be ignored but would have to be given consideration to. Having regard to the original Land Office file that was produced, the contents of his affidavit, except on one point, appear to have been substantiated by the file. That one point is about the copy of plan with the quoted words. Was it inside the original Land Office file when the application was first heard, and also when the second enquiry was conducted, prior and up to the time when the said Collector made his decision on 7 January 1983? For if it was so there in the file, it could have been seen by him with whatever consequences and effects it had on him before making the order on January 7, 1983. Looking at the plan with the quoted words and the original plan attached to the original application, the former appears to be a fresh plan, freshly drawn up by hand according to scale on the basis of other plan, while the latter appears to be a photocopy of actual official survey plan. I have taken into account the way or the manner in which documents appear to have been filed chronologically. Having regard to the onus for establishing bias or *mala fides* or that the said Collector was in effect influenced by the plan with the words quoted, that lies on the appellants, at this stage, after the hearing, the appellants have failed to discharge it by

satisfying me on a balance of probabilities that the said Collector had in fact before him up to the time when he made his decision on 7 January 1983 the copy of freshly hand-drawn plan with the impugned words, or that the said Collector was actually and in fact at all influenced by it. It is my finding that this plan with such quoted words was implanted by some unauthorised personnel into the file at some stage after 7 January 1983. If it had been intended to influence the said Collector, then in the event it had turned out, it was completely ineffectual and supererogatory.

The fourth contention raised for the appellants was that the order complained of was itself defective for failure to comply with s. 390(4) of the Code in that the order complained of did not sufficiently describe the land, the route of the right of way and did not state whether or not the persons using the right of way may pass and repass with animals and vehicles. Before dealing with this contention it would be pertinent to mention another one of similar kind.

The fifth contention for the appellants was that that part of the order complained of, as relating to the award of RM1 per sq. ft. was wrong, as such compensation could only be fixed by agreement between the person who was entitled to compensation and the State Commissioner for Lands and Mines, and in default, by arbitration, in accordance with s. 434 of the Code.

In my view, both the contentions just mentioned are well-founded but as to their effect and the manner of dealing with them by the Court, I will deal with them at a later stage of the judgment.

The sixth contention raised for the appellants was that the order was wrongly made because the Grantee had, before the application was made, an existing access to the sea shore. This was readily admitted by Counsel for Grantee, though it is common ground that the pre-existing access covers a much longer distance than that covered by the order complained of, i.e. it would cover a distance of one or two kilometers. It is to be borne in mind that the pre-existing access is through a route leading to a public highway and thence to the sea some distance away. It was submitted that it was never the intention of the legislature to grant a private right of way solely for pleasure purpose. Learned Counsel for the respondents submitted that s. 387 of the Code defined a public terminal as the foreshore, or a river, railway station or a public road; that though the Grantee had a pre-existing access to a public terminal, i.e. public road, he submitted to the effect that the Grantee was asking for access to a second public terminal and the said Collector could grant it. Further he submitted that the said Lot 293 was a sea-side resort and had a holiday bungalow thereon and the right of way was essential to the enjoyment of it. Learned State Legal Adviser for the 1st and 3rd respondents submitted that for the Grantee to go to the sea shore via a public highway over a distance of two kilometers was not convenient and the said Collector could grant a private right of way notwithstanding the presence of an existing access. He submitted that a pleasure purpose was within the meaning of the words "benefit" in s. 389 of the Code providing for a right of way to be created for the State Authority or a proprietor of alienated land.

All Counsel referred to the case of *Liew Peck Lian & Ors. v. The Conservator of Forests* [1961] MLJ 117 which was a case of right of way granted under Johore's former and repealed Land Enactment and in which it was held that before granting a right of way, a Collector must be satisfied that access was not otherwise reasonably available and that the word "reasonably" did not mean "conveniently". It was submitted that the private right of way granted herein was merely out of convenience to the Grantee; it would set a precedent for all owners of land to apply for one for pleasure purposes, and that such right would be granted in perpetuity. The Court will deal with the contention mentioned in this paragraph and the following contention together.

Another contention which I shall call the seventh contention was to the effect that the said Collector had exercised wrongly the discretion in granting the right of way.

Section 389 *et seq.* of the Code deals fairly exhaustively with the practice and procedure in respect of the granting of public or private right of way, but throws precious little light on the principles upon which the same is granted. This s. 389(3) of the Code provides:

> (3) A private right of way created **for the benefit** of the proprietor or occupier of alienated country land shall authorise the proprietor or occupier, as the case may be, and persons acting with the express or implied consent of the proprietor or occupier to pass and re-pass between the land and a public terminal.

Section 390(3) of the Code provides:

> (3) The Collector, if on holding an enquiry or making an investigation he is satisfied that it is **expedient** for a private or public right of way to be created, shall make an order creating the right of way.

The word "benefit" appearing in s. 389(3) is quite meaningless for the purpose of ascertaining the principles involved. The granting of a right of way to a land owner is bound to be of benefit to him. If that is all that is only required, an enquiry or investigation spoken of would be quite an exercise in futility. I do not consider it necessary to refer again to it.

The word, "expedient" occurring in s. 390(3) of the Code has always been an enigmatic one, a word pregnant with so many or numerous possibilities so that standing by itself without other words associated immediately with it, it would leave the field wide open. There are no such associated words like "in the public interest" or "in the interest of justice" etc. in s. 390(3).

Does the word "expedient" confer a blanket authority on a Collector to do whatever he thinks fit, in other words an unfettered discretion? In *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135, the Land Executive Committee of the Wilayah Persekutuan claimed an unfettered discretion to grant or reject an application under s. 124 of the Code, in connection with conversion of the land. It was held by the Federal Court that the Government had no power to make the applicant there for conversion give up its freehold title and receive in exchange a 99-year lease. On such unfettered discretion, Raja Azlan Shah, Acting CJ (Malaya), (as he then was) made the following memorable passage:

> ... Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* ([1958] 1 All ER 625) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint: where it is wrongly exercised, it becomes the duty of the court to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government department and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts LJ in *Bradbury v. London Borough of Enfield [1967] 3 All ER 434, 442)*

The *Concise Oxford Dictionary* (5th Edn.) defines the word "expedient" as "advantageous", "suitable", and as a noun, it is defined as a "contrivance" or "device". "Contrivance" is defined as an act of contriving, deceitful practice, invention etc. Therefore, when it is expedient to do something, it is conceivable, that such action may sometimes partake of an unprincipled quality, or that such action may sometimes be contrary to principle.

Having regard to the passage cited from *Sri Lempah's case* and having regard to the ordinary dictionary meaning of the word "expedient" which I have called with its connotation of acting contrary to principles (but rather than deceit which no legislature could have intended), it is my view that when a Collector is satisfied that it is expedient, it is tantamount to this, that he should then act or exercise his discretion properly and reasonably, in all cases, save in exceptional circumstances where such departure from such propriety or reasonableness can be made.

Though it is a truism to say that land or possession of land is inviolate, it is the first principle to be borne in mind here. Any interference or invasion of it is only tolerated on impeccable grounds. Any authority that is conferred on a public official to grant a right of way against a land owner for the benefit of another, has to be exercised, (considering the combined effect of the passage cited from *Sri Lempah case* and the deliberate use of the word "expedient" in the relevant section of the Code), for a proper purpose and reasonably unless exceptional circumstances exist.

It would be pertinent at this stage to examine the facts in this case for ascertaining the proper purpose and the reasonableness, and the exceptional circumstances if any. The undisputed purpose for the Grantee's application was one of pleasure, pure and simple. He wanted a shorter, or much shorter route to the sea for swimming and allied activities, the Grantee's own land being a second-layer land sandwiched between the 1st appellant's land (with its frontage to the sea shore) and a public road or highway. It has never been doubted that there has been an alternative route at all material times, to the sea shore via the public road available to the Grantee, but the distance to be covered would be between one to two kilometers instead of the comparatively short route through the 1st appellant's land. To revert to the task in hand, the purpose of the Grantee's application was proper enough if the words "proper purpose" are to be construed in contradistinction of an improper purpose. Next, was it reasonable in the circumstances to grant the private right of way? *In Liew Peck Lian case*, it was held that "reasonably" did not mean "conveniently". With respect I agree, for were it otherwise, the floodgates would definitely be opened for similar applications in future; possibly made with complete abandon. There must be something more than just mere inconvenience or convenience; some situation that partakes of gravity or urgent necessity. Further there were no exceptional circumstances here which could have impelled the said Collector to make the order complained of, or which made it, for the said Collector, expedient to make an order which would be contrary to principle, the main one being the inviolateness of land in this case. Looking at the facts before the said Collector, it is difficult also to imagine a less urgent necessity or situation than that before the said Collector. It is neither desirable nor easy to specify such urgent or grave situations. I feel I ought to give an example at least. It is conceivable that in the old days when agricultural land was subdivided, no provision was ever made for surrender of portions of land for road reserve for access to a public road from land-locked interior lots, with the result that should the owners of lots with frontage to such public road decide to seal up their borders or boundaries, some occupiers would be completely denied any access at all to such public road. There is thus an urgent necessity, or a grave situation which would make it expedient for a Collector to grant a right of way against those favourably-placed land owners, against the principle of inviolateness of land.

The said Collector has there erred in making the order complained of, in my judgment, and with this, it will not be necessary to deal with the fourth and fifth contentions. Had the order complained of been upheld, then this Court would make suitable amendments bearing such 4th and 5th contentions in mind.

There is another point with which I think I ought to deal. The juxtaposition of Torrens system of land law represented by the Code, with the principle of inviolateness of land, does nothing to detract the latter from its value. In passing, the common law and equity in relation to land have remained largely unimpaired by the Code which is, substantially, a system of registration of conveyances of land, and not to oust such common law and equity. It is a system that is far superior to the English land conveyancing system which involves examination of numerous complex entries, involving in turn pitfalls and uncertainties in a field in which even a professional expert has to walk gingerly.

I therefore allow the appeal of the appellants by setting aside the order appealed from with costs in this Court but with no order as to costs for proceedings before the said Collector.

Also found at [1986] 1 CLJ 584